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April 20, 1997

VIA COURIER

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Annual Assessment of the Status of Competition in Markets for The Delivery of Video Programming.

Dear Mr. Caton:

Enclosed for filing please find an original and nine (9) copies of the Reply Comments of RCN Telecom Services, Inc. in the above reference matter. Enclosed also is a 3.5 inch diskette containing the Reply Comments in WordPerfect 5.1 format.

If you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,

Jean L. Kiddoo
Rachel D. Flam

Its Counsel

Enclosures

cc: Meredith Jones - Cable Services Bureau
International Transcript Services (ITS)
Lawrence Spiwak - Office of the General Counsel

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3000 K Street, N.W. ■ Suite 300
Washington, D.C. 20007-5116
(202)424-7500 ■ Telex 701131 ■ Facsimile (202)424-7645

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 97-141
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

Jean L. Kiddoo
Rachel D. Flam

SWIDLER & BERLIN, CHTD.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7834 (tel.)
(202) 424-7645 (fax)

August 20, 1997

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SUMMARY

RCN Telecom Services, Inc. ("RCN"), through subsidiaries in Boston, New York, Pennsylvania, and, in the near future, Washington, D.C., is a facilities-based provider of local and long-distance telephone, video and Internet access to the residential markets. As a new entrant, competing in major markets through a variety of services and technologies, RCN believes that it is well qualified to provide the Commission with comments on the status of competition, particularly in the residential markets.

Despite what commenters like the National Cable Television Association ("NCTA") and US West, Inc. ("US West") would have the Commission believe, competition in the video programming markets is far from widespread. Cable operators have lost little market share since the Commission's last competition report and, indeed, continue, through a variety of anti-competitive means, to impede the development of competition in the MVPD markets. Accordingly, RCN submits that continued efforts by the Commission, and possibly the Congress, are required to assure that truly effective competition becomes a reality.

For example, RCN agrees with Bell Atlantic and NYNEX ("Bell Atlantic") and other commenters that the increasing consolidation within the cable industry, intensifying the stronghold that large cable interests have long had on key programming, especially sports programming, has rendered the program access rules now more necessary than ever. The Commission must, accordingly, clarify its policies and, where necessary, amend its rules to address the anti-competitive behavior currently impeding competition and threatening to continue. Specifically, in light of recent indications that certain cable operators are switching distribution technologies for the express purpose of circumventing the Commission's program access rules, the Commission must act now to amend its rules (and, as necessary, seek Congressional amendment to its enabling statute) so as to apply to all MVPDs, not just those delivering programming via satellite. Additionally, as suggested by certain commenters, the

Commission should provide a deterrent to violations of its program access rules by imposing fines on violators. Without the threat of forfeitures, an incentive exists to violate the rules if for no other reason than to forestall competition.

The Commission must also resolve its *Inside Wiring* proceeding expeditiously to increase competition in multiple dwelling units. Given the current cable home wiring rules for multi-unit dwellings, incumbents are often able to forestall competition simply by denying access to space under moldings or within conduits that are essential to reach the current demarcation points. To remedy this problem, the Commission should either move the demarcation point to a location where individual wiring meets the incumbent's common distribution plant or, at a minimum, must make clear that where a building owner agrees to permit competitive service, an incumbent may not deny access to space under moldings or within conduits where room exists to accommodate a competitor's wiring. Where no room exists, the Commission should require that the incumbent either sell, remove or abandon unused "drops."

RCN also urges the Commission to articulate to Congress and the Copyright Office its view that a compulsory license should be available to OVS providers and, moreover, that OVS operators easily meet Section 111's definition of a "cable system."

Finally, the Commission's OVS rules are providing a means for competitive entry, but the Commission should report to Congress that constant legal challenges, like the present appeal before the Fifth Circuit and Cablevision's anti-competitive attempts to gain access to RCN's Boston OVS system, threaten their continuing viability. It should also take swift action to reject such challenges where they occur within its purview.

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Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, respectfully submits the following Reply comments in the above-captioned proceeding.

I. INTRODUCTION

RCN, through subsidiaries in Boston, New York, Pennsylvania and, in the near future, Washington, D.C., is a facilities-based provider of local and long-distance telephone, video and Internet access to the residential markets. As a new entrant which must compete in these major communications markets with some of the nation's largest, most well-established telephone and cable incumbents, RCN uses a variety of services and technologies, including some made available for the first time by the Telecommunications Act of 1996 (the "1996 Act"), to offer its services.[1] At the time the 1996 Act was passed, many of the largest industry players predicted rapid deployment of facilities and services outside of their dominant market areas. To date,

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). For example, with respect to its video services, RCN has been certified to operate open video systems to distribute programming to subscribers in Boston and New York City.

however, few have made significant headway. RCN, on the other hand, which does not have an incumbent monopoly position from which to launch a competitive service in other industry segments, is in fact helping to make the pro-competitive goals of the 1996 Act a reality. Accordingly, RCN believes that it is well qualified to provide the Commission with comments on the status of competition, particularly in the residential market.

RCN is making significant efforts to bring competition to the monopoly cable operators in its markets, which will take massive investment in facilities and infrastructure in order for it to offer a competitive service to companies who have had over a decade to construct networks in a monopoly environment. BellSouth's comments correctly observed that "reports of the cable industry's demise have been greatly exaggerated. . . ."[2] For, despite what commenters like the National Cable Television Association ("NCTA") and US West, Inc. ("US West") would have the Commission believe, competition in the video programming markets is far from "thriving."[3] Indeed, as USTA demonstrates, cable operators have lost little ground since the Commission's last report to Congress on the state of competition in the video market.[4] The cable industry's self-interested claims of great emerging competition justifying elimination and/or relaxation of the present pro-competitive protections inherent in the 1996 Act and the Commission's rules

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2 Comments of Bell South at 3.

3 *See generally* Comments of NCTA; Comments of US West.

4 *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report (Jan. 2, 1997) ("1996 Competition Report").

blink the reality of the marketplace and, if adopted by the Commission, would be devastating to the realization of full and effective competition in the video marketplace.

In reality, there are still many barriers to competition in the MVPD marketplace -- perhaps the greatest among them, the incumbents themselves. Through a variety of means, incumbents are manipulating the regulatory process and exploiting their monopoly positions to deny consumers the competitive benefits that Congress intended to foster under the 1996 Act. Accordingly, to assure that the tiny inroads that new entrants are making in the market can expand into broad-based competitive services available to more than a few consumers, the Commission and Congress must be all the more vigilant and steadfast in their efforts to safeguard and promote competition.

II. THE COMMISSION AND CONGRESS MUST ASSURE PROMPT ACCESS TO PROGRAMMING

RCN agrees with Bell Atlantic ("Bell Atlantic") and other commenters that the recent trend toward ever-expanding consolidation within the cable industry has intensified the stronghold that large cable interests have long had on key television programming.[5] As the Commission has recognized, "[a]ccess to programming [is] one of the most critical factors for the successful development in the MVPD marketplace."[6] Indeed, a competitor's very viability may turn upon its access to certain key programming -- particularly sports programming. In New York City, for example, a multi-channel video programming distributor ("MVPD") unable to offer Knicks basketball games or Ranger hockey games would simply be unable to compete in

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5 *See, e.g.,* Comments of Bell Atlantic at 2-7.

6 *See* 1996 Competition Report at ¶ 4; *see also* Comments of Bell Atlantic at 1.

the market. As a result, effective Commission enforcement of its program access rules continues to be a critical necessity. Indeed, in light of indications that certain cable operators are making intensive efforts to circumvent the Commission's rules through use of alternative distribution technologies, the Commission must clarify its policies, and where necessary amend its rules, to forestall such blatantly anti-competitive actions.

In RCN's Boston and New York OVS markets, for example, RCN competes with Cablevision, one of the largest, most well-established cable operators in the country which is part of a corporate family which has been referred to as a "powerhouse of television sports."[7] With affiliate ownership interests in the Knicks, the Rangers, MSG Network, and Madison Square Garden, and cable rights in the Yankees, Mets, Devils, Nets and Islanders (five of the most popular sports teams in the New York area), Cablevision has, absent vigilance by the Commission, the ability to squelch any and all competition by impeding access to its sports programming.[8]

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[7] Geraldine Fabrikant, *As Wall Street Groans, A Cable Dynasty Grows*, New York Times (April 27, 1997).

[8] Cablevision is not alone. Recently, other incumbent cable operators have increased their presence in this area. In June 1997, Fox Sports Net -- a joint venture between News Corporation's ("News Corp") Fox Sports and Telecommunications, Inc.'s ("TCI") Liberty Media -- purchased a 40% interest in Cablevision's sports empire. *See* Richard Sandomir, *Cable Wires are Tangled as Avalanche Receives Aid*, The New York Times (Aug. 14, 1997). Earlier, in May 1997, News Corp. announced a joint venture with digital-to-home provider, Primestar. Significantly, Primestar is owned by five of the nation's top cable operators, including TCI and Time Warner. In addition to its interests in the Cablevision sports empire by virtue of its ownership in Fox Sports Net, TCI also earlier this year, in exchange for 800,000 New York customers, acquired a 30% stake in Cablevision. Michael D. Sorkin, *Cable Firms Here Talk of Merger; Charter-TCI Deal on Hold*, St. Louis Post-Dispatch (June 26, 1997).

Unfortunately, contrary to what Home Box Office ("HBO") would have the Commission believe,[9] corporate affiliations which bring together cable operators and key cable programming interests have an incentive to behave anti-competitively. Why else would the programming arms of these conglomerates foreswear their normal and natural incentive to maximize the delivery of their programming to as many subscribers as possible, and instead refuse to deal with competitors of their affiliates?

Clearly, the existing -- and expanding -- consolidation between cable operators and programmers results in a marketplace which does not adequately assure that programmers will behave in a pro-competitive manner. Indeed, only recently, the Commission was compelled to take action against Rainbow Programming Holdings, Inc., a Cablevision affiliate, for its unlawful and anti-competitive denial of important programming to Bell Atlantic's OVS system in New Jersey.[10] Such refusals to provide programming to unaffiliated MVPDs on a non-discriminatory, competitive basis plainly impedes competition. Accordingly, the Commission must continue to enforce its existing program access rules and to forestall any efforts by the cable industry to circumvent those rules by moving their services from satellite distribution to terrestrial facilities. In addition, to deter companies from delaying the entry of their competitors and forcing them to incur needless expenditures of money and resources in program access proceedings at the

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[9] *See generally* Comments of HBO.

[10] *In the Matter of Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., and Cablevision Systems Corporation,* Memorandum Opinion and Order (Rel. July 11, 1997).

Commission, RCN also supports certain commenters' calls for penalties for violations of the program access rules.

A. The Commission Should Expand Its Program Access Rules To Apply To Programming Delivered By Methods Other Than Satellite.

RCN agrees with commenters that urge the expansion of the program access rules to cover programming delivered by methods other than satellites.[11] As the Commission is aware, the important protections inherent in these rules apply specifically to satellite-delivered programming. Operators delivering programming by other means, such as fiber optic cable, are not covered. This loophole will -- and possibly already has -- permitted cable operators and their affiliates to evade the rules to the detriment of competitors and competition in the MVPD marketplace.

The Commission must respond without delay. As BellSouth and Ameritech have noted,[12] the Commission's 1996 Competition Report stated that if presented with evidence that cable operators are using this loophole for anti-competitive purposes, the Commission will "consider an appropriate response to ensure continued access to programming."[13] As several commenters have brought to the Commission's attention, there *is* now such evidence and the appropriate Commission response is to plug that loophole quickly and decisively *before* it can be used to stop new entrants from competing.

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[11] *See e.g.,* Comments of Ameritech at 18-19; Comments of Bell Atlantic at 6-7.

[12] Comments of BellSouth at 14-15; Comments of Ameritech at 18.

[13] 1996 Competition Report at ¶ 154.

Recently, for example, the New York Times reported that:

> Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.[14]

As noted above, with incumbent monopoly cable operators in control of key programming necessary for true competition, the stakes are high. The time to respond is now. The Commission must immediately amend its program access rules, and, as necessary, seek Congressional amendment to its enabling statutes, to make the program access rules applicable regardless of the method of delivery.

B. The Commission Should Impose Penalties for Failure to Comply with its Program Access Rules.

Several commenters urged the Commission to impose penalties for failure to comply with the Commission's program access rules.[15] RCN agrees. Without the threat of being subjected to damages or a fine, would-be violators have every incentive to ignore the rules if for

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[14] Geraldine Fabrikant, *As Wall Street Groans, A Cable Dynasty Grows*, New York Times (April 27, 1997); *see also* R. Thomas Umstead, *Cablevision Reaches for Sports Exclusivity*, Multichannel News (Feb. 10, 1997).

[15] *See e.g.,* Comments of OpTel at 6; Comments of NRTC at ¶¶ 10-17; and Comments of Ameritech at 24-28. Ameritech also filed a Petition for Rulemaking addressing this and other issues relating to the Commission's treatment of violations of, and complaints under, Section 628.

no other reason than to forestall competition by subjecting competitors to delay and needless expense. The Commission has the authority to impose such penalties, and it should.[16]

RCN agrees with Ameritech that "the Commission's current policy creates a situation where it makes good business sense to dispel competition and to violate [the program access rules]."[17] As Ameritech further points out, the recidivist behavior of Cablevision and its affiliates is plain evidence of that incentive.[18] As noted above, the Commission recently found that Rainbow Programming Holdings, Inc. ("Rainbow"), a Cablevision affiliate, discriminated against Bell Atlantic's New Jersey OVS system in the sale of satellite programming cable in violation of the program access rules.[19] The Commission found that Rainbow had violated its rules. Nonetheless, and despite the fact that this was not the first time the Commission has found that Rainbow unlawfully denied programming to a competitor MVPD,[20] and was, indeed, one of a string of program access complaints filed against Rainbow for similar refusals under the Commission's video dialtone rules,[21] the Commission did not assess any penalties. In essence,

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[16] 47 U.S.C. § 548(e) ("[T]he Commission shall have the power to order appropriate remedies. . . .").

[17] Comments of Ameritech at 26.

[18] *See* Comments of Ameritech at 26-28.

[19] *See In the Matter of Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., and Cablevision Systems Corporation,* Memorandum Opinion and Order (Rel. July 11, 1997).

[20] *In the Matter of Cellularvision of New York, L.P. v. Sportschannel,* Memorandum Opinion and Order, 10 FCC Rcd 9273 (1995), Order on Reconsideration, 11 FCC Rcd 3001 (Mar. 12, 1996).

[21] *See, e.g., In the Matter of Interface Communications Group, Inc. v. American Movie Classics and Rainbow Holdings, Inc.* (filed Feb. 16, 1997); *CAI Wireless Systems, Inc. v.*

Rainbow was once again permitted to delay and hinder competition for nearly a full year with no meaningful penalties or other repercussions.

With no price to pay for such anti-competitive behavior, it is little wonder that Cablevision and its affiliates have had a number of program access complaints filed against them. The Commission can prevent such anti-competitive behavior by imposing penalties that discourage incumbent monopoly cable operators from using their stronghold on key programming as a means to delay competition.

III. THE COMMISSION SHOULD ACT SWIFTLY TO ENSURE COMPETITIVE ACCESS TO MULTIPLE DWELLING UNITS

Another significant means by which some incumbent cable operators can impede competition is by failing to allow or severely limiting access by would-be competitive providers to inside wiring and space within multiple dwelling unit ("MDU") buildings. Several commenters note that competition will continue to be significantly impeded until the Commission addresses this important issue,[22] particularly since MDUs often serve as the "anchor tenants" which can justify the huge capital expenditures necessary to justify construction of new fiber optic distribution facilities which then can serve single family dwellings. RCN's experience in New York and Boston underscores these arguments. In the *Inside Wiring* proceeding,[23] the

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Cablevision Systems, Inc., Rainbow Programming Holdings, Inc., Sports Channel New England, Sports Channel New York (filed Feb. 28, 1997).

[22] *See e.g.,* Comments of Ameritech at 30-34; Comments of BellSouth at 19.

[23] *In the Matter of Telecommunications Services Inside Wiring*, Notice of Proposed Rulemaking, CS Docket No. 95-184 (Jan. 26, 1996) ("*Inside Wiring*")

Commission, recognized the anti-competitive potential of the present cable inside wiring rules.[24] Unfortunately, however, until the Commission acts to end this anti-competitive impact, the construction of full serve competitive networks to residential consumers will be hamstrung.

In MDUs, access to the existing cable home wire demarcation points is often limited by space and construction constraints.[25] Incumbents, anxious to hold on to their monopoly positions within buildings, are therefore able effectively to exclude competitors from MDUs by denying competitors access to space under moldings or within the conduits which are the only means of access to the demarcation points and therefore the only means of supplying a competitive service. Understandably (and predictably), building owners are often unwilling to allow duplicate moldings or to have their walls torn down for additional internal conduits. Accordingly, even though building owners might want to permit competition in the building, a competitor will often effectively be denied access to the building altogether by the incumbent cable operator. In other words, the incumbent wins . . . and the consumer loses.

The Commission must act swiftly to assure that incumbent providers are not allowed to squelch MVPD competition. Access to demarcation points must be assured to all MVPDs permitted by the building owner to offer service in a building. To this end, RCN urges the Commission to either move the demarcation point to a location where individual wiring meets the incumbent's common distribution plant or, at a minimum, make clear that where a building

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[24] *See Inside Wiring* at ¶ 17.

[25] The current cable home wiring rules set the demarcation point for multiple dwelling units at "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. § 76.5(mm)(2).

owner agrees to permit competitive service, an incumbent may not deny access to space under moldings or within conduits where room exists to accommodate a competitor's wiring. Where space is not available, the incumbent should be required to either sell, remove or abandon unused "drops."[26] Specifically, RCN proposes that, upon notice that space is needed to access the demarcation point, the incumbent provider have seven days to negotiate a sale of the existing unused drop(s) with the building owner. The sale price would be determined, as with cable home wiring, based upon the replacement cost per foot of the wiring multiplied by the length in feet of the wiring and the replacement cost of any passive splitters located along the length of the drop.[27] If the parties are unable to reach an agreement on the terms of a sale, the Commission should require that the incumbent, within seven days, either abandon or disconnect the drop(s) (without disabling them) or remove the wiring. The incumbent should be required to notify the would-be competitive provider of its election -- as between abandonment, disconnection or removal -- no later than the seventh day.

No unconstitutional taking would be effected by the regime. To begin with, no cable operator or other MVPD has any common law right to exclude another provider from any empty space within a building, including space under moldings or within conduits. The empty space

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[26] In the *Inside Wiring* Notice of Proposed Rulemaking, the Commission defines a "drop" as a dedicated line running to the subscriber's premises. *Inside Wiring* at ¶ 7. The Commission should clarify that "drop" means the portion of the individual dedicated subscriber line between the demarcation point of the cable home wiring and the common or "feeder" lines.

[27] *See* 47 C.F.R. § 76.802(a).

within the building belongs to the building owner.[28] A cable operator's property interest, if any, in space within a building would derive from either an express contract with the building owner or a state mandatory access statute. RCN's proposal would not impinge upon these rights since the proposed rules expressly apply only in instances where the building owner consents to the competitor's provision of service within the building and the cable operator has no contractual property interest or right to exclude competitors from unused space within the building.[29] Similarly, no taking would be effected by the rules applying to the drops. The incumbent provider always has the option to sell the drop(s), in which case it would be entitled to compensation therefore. In the alternative, the owner may simply remove the wiring. Abandonment or disconnection are at the incumbent provider's option.

IV. LEGAL AND ADMINISTRATIVE CHALLENGES TO THE OVS RULES HINDER COMPETITION

RCN empathizes with the position of the United States Telephone Association ("USTA") reflecting an ambivalence on the part of local exchange carriers to deploy OVS in light of the uncertainty created by certain pending legal challenges to the OVS rules.[30] As one of two OVS

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[28] *See generally Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a cable installation upon a building constitutes a taking necessitating just compensation).

[29] *Nichols on Eminent Domain* (3d Ed.) at § 5.03[6][f][iv] ("A contract giving one public service corporation the exclusive privilege of maintaining its work upon a certain tract of land creates no property right that the law will recognize when enforcing the exercise of eminent domain over the same land in behalf of another corporation.") Whether and to what extent the building owner can, by contract, grant any MVPD *de facto* exclusivity by allowing the installation of molding or conduits dedicated exclusively for the use of the incumbent cable operator or other MVPD should be the subject of a further Notice of Proposed Rulemaking.

[30] *See* Comments of USTA at 3-7.

providers operating to date, RCN can attest first-hand to the burden imposed by such constant challenges and the uncertainty created thereby. As USTA noted in its comments, at this time the cable industry's challenge of the OVS rules is pending before the Fifth Circuit.[31] If that challenge succeeds as to certain key Commission rules, OVS will not be viable without additional legislative changes. And, as a result of this uncertainly, potential competitors are understandably reluctant to take on the huge capital expenditures needed to construct an OVS system. Accordingly, the Commission's report to Congress should advise it of the threat that exists to the OVS provisions of the 1996 Act, and the consequent harm to competition that this uncertainly has provoked.

While the Commission has already persuasively made its arguments in the Court of Appeals in support of its OVS rules, and there is little more that it can do to dispel the uncertainty created by the appeals, there are other anti-competitive regulatory efforts by the cable incumbents underway to which the Commission can and should promptly put an end. For example, as noted in Cablevision's comments in this proceeding, Cablevision has initiated a proceeding before the Commission in which it seeks to obtain highly confidential and proprietary information from RCN Boston OVS system purportedly for the purpose of obtaining access to the open video system.[32] As RCN has emphasized in that proceeding, Cablevision simply is not, as a legal matter, entitled to obtain such information or access. The Commission's rules make

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[31] *City of Dallas, Texas, et al. v. Federal Communications Commission and the United States of America*, Case Nos. 96-60502 (filed July 30, 1996).

[32] *Petition for an Expedited Determination Regarding Authorization to Obtain Capacity on the Open Video System of RCN-BETG, LLC Serving 48 Communities in Massachusetts*, DA 97-1051 (filed May 15, 1997).

clear that an in-region cable operator such as Cablevision is not entitled to access to an open video system unless the cable operator can demonstrate that permitting such access would not significantly impede facilities-based competition.[33] Cablevision has failed to make such a showing. Moreover, as a policy matter, Cablevision's position simply flies in the face of the policy goals underlying OVS -- to promote competition *against* incumbents like Cablevision.

Yet Cablevision's comments in this proceeding would have the Commission believe that it is RCN which is impeding competition. While RCN understands that Cablevision may believe that its best defense to its own anti-competitive behavior is to take the offensive, RCN trusts that the Commission will see through this patently absurd argument and stand firm in support of its OVS rules and the pro-competitive reasoning on which they were based. Moreover, it must do so promptly so as not to permit Cablevision to further impede competition as it has when it has violated the Commission's program access rules.

V. THE COMMISSION SHOULD MAKE CLEAR ITS VIEW THAT A COMPULSORY LICENSE SHOULD BE AVAILABLE TO OVS PROVIDERS

In its comments, Bell Atlantic urged the Commission to confirm for the Copyright Office, which was at that time reviewing the issue for purposes of preparing a report to Congress on copyright licensing,[34] that OVS should be treated as a "cable system" for purposes of the

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[33] 47 C.F.R. § 76.1503(c)(2)(v).

[34] On May 6, 1996, the Copyright Office opened a notice of inquiry to consider this topic. *Eligibility for the Cable Compulsory License*, Proposed Rules, Docket No. 96-2 (May 6, 1996). On May 8, 1997, however, the docket was terminated until further notice in light of the above request from Congress. *Eligibility for the Cable Compulsory License*, Notices, Docket No. 96-2 (May 8, 1997).

federal cable compulsory licensing regime.[35] On August 1, 1997, the Copyright Office submitted the report to Congress,[36] in which it recommended, among other things, that open video systems be deemed eligible for compulsory licensing.[37] The Copyright Office felt, however, that certain amendments to the present statutory regime should be made to effectuate this extension.[38] The Copyright Office clearly arrived at the correct result; however, Section 111's definition of a "cable system" already accommodates such an extension.

The Commission must communicate to Congress and the Copyright Office the critical importance of making compulsory licenses available to OVS providers. As Bell Atlantic noted in its comments, "[i]f MVPDs or other video programming providers using OVS capacity were required to negotiate individually with each copyright holder of each program on a broadcast station included in the programmer's line-up, programmers would have no interest in using OVS to reach subscribers."[39] A failure to extend this benefit to OVS would undermine the pro-competitive goals of the 1996 Act and the OVS provisions in particular. As the Copyright Office correctly points out "it would be patently unfair, and it would thwart Congress' intent in creating the open video system model, to deny the benefits of compulsory licensing when such benefits

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35 *See e.g.*, Comments of Bell Atlantic at pp 7-9; *see also* USTA at 6-7.

36 U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Aug. 1, 1997) ("*Report*").

37 *Report* at 76-78.

38 *Report* at 78.

39 Comments of Bell Atlantic at 8.

are enjoyed by traditional cable systems, satellite carriers, SMATV systems, and MDS and MMDS operations."[40]

That being said, the Commission should make clear its view that the Copyright Office already has the authority, under Section 111, to make available to OVS the same benefit available to cable. This is particularly important given the Copyright Office's express statement that "[n]othing in [its report] is intended to indicate the Office's disposition of the issue of OVS' eligibility for a compulsory license of a section 111 cable system should Congress decline to act on the Office's legislative recommendations."[41] For purposes of eligibility for compulsory licensing, Section 111 defines a "cable system" as "a facility, located in any State, Territory, trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service."[42] OVS clearly falls within this definition.[43]

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40 *Report* at 76.

41 *Report* at 66 n. 84.

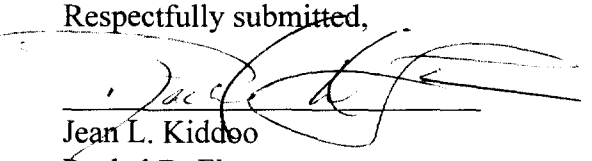
42 17 U.S.C. § 111(f).

43 *See also* Comments of Bell Atlantic at 8.

VI. CONCLUSION

In summary, in the interest of seeing the competitive goals of the 1996 Act realized, RCN urges a strengthening of the program access rules. They must be amended to apply irrespective of the method by which programming is delivered. The Commission should, additionally, put teeth in its rules by imposing penalties for program access violations. RCN further urges the Commission to resolve its inside wiring proceeding expeditiously and in favor of competition. The Commission should make clear its view that a compulsory license should be available to OVS providers. Finally, RCN reports that the OVS rules do offer an alternative means of competitive entry which will further the national goal of bringing competition to the monopoly cable market so long as the Commission acts promptly and decisively to dispel the uncertainty caused by efforts of the cable industry to create delay and investment uncertainty through the gaming of the regulatory process.

Respectfully submitted,



Jean L. Kiddoo
Rachel D. Flam

SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7834 (tel)
(202) 424-7645 (fax)

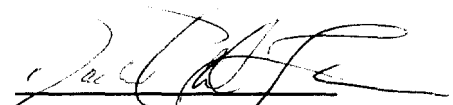
Counsel for RCN Telecom Services, Inc.

Dated: August 20, 1997

200329.2

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of RCN Telecom Services, Inc. were delivered by hand or by first class mail to those on the following list.



Rachel D. Flam, Esq.

William F. Caton*
Acting Secreaary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

Meredith Jones, Esq.*
Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW Room 918
Washington, DC 20554

Lawrence Spiwak *
Federal Communications Commission
1919 M Street, NW Room 650 H
Washington, DC 20554

Henry Goldger
W. Kenneth Ferree
GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Loretta P. Polk
NATIONAL CABLE TELEVISION ASSOC., INC.
1724 Massachusetts Avenue, NW
Washington, DC 20036

Eric E. Breisach
Christopher C. Cinnamon
Kim. D. Crooks
HOWARD & HOWARD
The Kalamazoo Building, Suite 400
107 W. Michigan Avenue
Kalamazoo, MI 49007-3956

James Baller
Lana Meller
The Baller Law Group
1820 Jefferson Place, N.W.
Washington, DC 20036

Brian Conboy
Michael H. Hammer
C. Grace Campbell
WILLKIE FARR & GALLAGHER
1155 21st Street, NW, Suite 600
Washington, DC 20036-3384

Jack Richards
Wallace F. Tillman
A. Arnold Horton
National Rural Electric Cooperative Assoc.
4301 Wilson Boulevard
Arlington, VA 22203-5500

Philip L. Malet
Pantelis Michalopoulos
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

William F. Caton*
Acting Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

Meredith Jones, Esq.*
Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW Room 918
Washington, DC 20554

Lawrence Spiwak *
Federal Communications Commission
Office of General Counsel
1919 M Street, NW Room 650 H
Washington, DC 20554

Henry Goldger
W. Kenneth Ferree
GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Loretta P. Polk
NATIONAL CABLE TELEVISION ASSOC., INC.
1724 Massachusetts Avenue, NW
Washington, DC 20036

Eric E. Breisach
Christopher C. Cinnamon
Kim. D. Crooks
HOWARD & HOWARD
The Kalamazoo Building, Suite 400
107 W. Michigan Avenue
Kalamazoo, MI 49007-3956

James Baller
Lana Meller
The Baller Law Group
1820 Jefferson Place, N.W.
Washington, DC 20036

Brian Conboy
Michael H. Hammer
C. Grace Campbell
WILLKIE FARR & GALLAGHER
1155 21st Street, NW, Suite 600
Washington, DC 20036-3384

Jack Richards
Wallace F. Tillman
A. Arnold Horton
National Rural Electric Cooperative Assoc.
4301 Wilson Boulevard
Arlington, VA 22203-5500

Philip L. Malet
Pantelis Michalopoulos
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036